GASING HEIGHTS SDN BHD

v

ALOYAH ABD RAHMAN & ORS

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR JCA
[CIVIL SUIT NO: 22-187-91]
2 AUGUST 1996

CIVIL PROCEDURE: *Abuse of process – Malicious institution of proceedings – Whether an abuse of Court's process by way of a distinct tort – Whether tort of maliciously instituting civil proceedings exists – Whether action for remedies afforded by the law can amount to an abuse of process – Collateral advantage – Ulterior purpose*

CIVIL PROCEDURE: *Abuse of process – Mode of seeking redress – Whether collateral action proper – Whether must be by way of O 18 r 19(1) of Rules of the High Court 1980*

CIVIL PROCEDURE: *Action – Action for declaration that defendants' originating motion was an abuse of process – Application for injunction to prevent defendants from continuing with originating motion – Whether plaintiff's action in itself an abuse of process – Whether plaintiff's statement of claim disclosed reasonable cause of action – Whether plaintiff's action premature*

CIVIL PROCEDURE: *Action – Application by defendants for certiorari, stay of proceedings, and discovery of documents – Whether application an abuse of Court's process*

TORT: *Malicious prosecution – Whether tort of maliciously instituting civil proceedings exists – Whether an abuse of Court's process by way of a distinct tort*

TORT: *Tort of conspiracy – Whether ingredients of conspiracy must be pleaded with great particularity – Conspiracy to injure by lawful means – Defendants' originating motion – Whether filed with predominant purpose of injuring plaintiff – Whether parallel intention to injure plaintiff sufficient – Whether defendants used unlawful means*

The seven defendants ('the defendants'), against whom the instant suit was brought by the plaintiff, are residents of dwelling houses situated in close proximity to Bukit Gasing, a substantial portion of which has been designated a Green Belt area ('the area'). In September 1990, the defendants had alerted the Majlis Perbandaran Petaling Jaya ('the MPPJ') of some survey work being done at the area. This was followed by a visit from the MPPJ's Town Planner who then gave public assurances that development projects would not be approved in the area. Similar assurances were also given by political figures.

In February 1991, the defendants suspected a large-scale development project being carried out in the area. They were unaware that the MPPJ had already approved a development project thereat on 10 December 1990. On 28 February 1991, the defendants wrote to the President of the MPPJ protesting against the project. There was no reply. A subsequent meeting between the defendants and the MPPJ proved to be equally unavailing. The Petaling Jaya People's Association's request for documents and information on the project from the MPPJ was also unrequited.

On 3 June 1991, the defendants filed an originating motion ('the OM') for leave to file, *inter alia*, an application for *certiorari* to quash the MPPJ's approval of the project, for consequential relief including a stay of proceedings, and for discovery of documents. The defendants allege, *inter alia*, that their delay in filing the OM was due to the MPPJ's deliberate suppression of material information. The plaintiff in the instant suit was named as the second respondent in the OM.

On 25 June 1991, the plaintiff filed the instant suit against the defendants. The statement of claim averred, *inter alia*, that: (i) the defendants' OM was filed maliciously and/or without reasonable or probable cause; (ii) upon the instigation and abetment of the fifth defendant, all the defendants had wrongfully, maliciously and/or without reasonable or probable cause, and with the intent to injure, conspired and agreed together to jointly file the OM in bad faith for no other purpose than to cause irresponsible damage to the plaintiff; (iii) the defendants' wrongful and malicious filing of the OM was an abuse of the process of the Court, not to obtain judicial remedy, but for their own collateral purpose with an ulterior motive and/or to cause damage to the plaintiff through bad publicity; (iv) the OM must fail as more than six months had elapsed between the MPPJ's approval of the project and the filing of the OM; and (v) the defendants had no *locus standi* to sue the MPPJ, and that the plaintiff had been needlessly named as a party to the OM. The relief sought was a declaration that the OM was an abuse of the process of the Court, an injunction to prevent the defendants from continuing with the OM, and general and special damages.

On 18 October 1991, the defendants' OM was heard by a Judge who then dismissed it on the ground that it was filed outside the six-week period provided by O 53 r 1A of the Rules of the High Court 1980 ('the RHC'). Extension of time was refused on the ground of inordinate delay. The defendants then appealed to the Supreme Court.

In the meanwhile, the plaintiff in the instant suit served its writ and statement of claim on the defendants. The defendants then filed a summons-in-chambers to strike out the said statement of claim based on O 18 r 19(1)(a), (b), (c) and (d) of the RHC.

Held:

[1] In determining whether the plaintiff's statement of claim disclosed a reasonable cause of action or whether it was in itself an abuse of the process of the Court, regard must be had to the state of affairs prevailing on 25 June 1991. On that very day, the defendants' OM was far from being heard. Thus, by filing its writ on 25 June 1991, the plaintiff was literally seeking to pre-empt the defendants from proceeding any further with the OM.

[2] The plaintiff's whole claim could have been thrown out on a technicality. The statement of claim had erroneously averred that the defendants filed their OM on 3 June 1990, when in actual fact it was filed on 3 June 1991.

[3] Paragraph 5 of the plaintiff's statement of claim was clearly a pleading alleging malicious prosecution. However, no particulars on 'malice' or the 'lack of reasonable and/or probable cause' were given. Although not fatal, on this ground alone, the plea should be struck out.

[4] The plaintiff's claim against the defendants for malicious prosecution could not succeed because it was manifestly premature. It was not open to the plaintiff to launch a claim based on malicious prosecution until the proceedings in the defendants' OM have been resolved, ie, after the conclusion of the defendants' appeal to the Supreme Court. The defendants have an arguable case on appeal thereto.

[5] No particulars were pleaded in support of the plaintiff's claim against the defendants for conspiracy in respect of the joint filing of the OM. Just as fraud must be pleaded with great particularity, so must the constituent ingredients of an allegation of conspiracy be pleaded. On this ground alone, the plaintiff's claim in respect of conspiracy must fail.

[6] To establish the tort of conspiracy to injure the plaintiff by lawful means, it must be pleaded that the defendants' OM was filed with the predominant purpose of injuring the plaintiff. Since the primary or predominant purpose of the defendants in filing the OM was to further and to protect their own legitimate interests, the allegation of a parallel intention to injure the plaintiff could not be sustained unless unlawful means were used by the defendants. However, it was not alleged that the predominant purpose of the OM was to injure the plaintiff or that the defendants used unlawful means. On this ground, the plaintiff's allegation of conspiracy must also fail.

[7] This may well be the first time in Malaysia that a litigant has attempted to put forward the proposition that the malicious institution of proceedings is an abuse of the process of the Court by way of a distinct tort.

[8] It cannot be over-emphasised that if a party brings an action to protect his rights (as did the defendants in filing the OM), then the use of all remedies afforded to him by the law cannot amount to an abuse of the process of the Court. When a litigant sues to redress a grievance, no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. And even if it can be shown that the litigant, who has a genuine cause of action which he would wish to pursue in any event, has also an ulterior purpose in view as a desired by-product of the litigation, it is very doubtful that the pursuance of the action would amount to an abuse of the process of the Court. In the instant suit, the plaintiff had prayed for relief which included an injunction, the effect of which was to prevent the defendants from proceeding with the OM they had filed for a relief by way of *certiorari* which is recognised by the law. To grant the plaintiff such an injunction would have been a denial of justice.

[9] There is a well-established tort known as the tort of malicious prosecution. However, there is great doubt whether any general tort of maliciously instituting civil proceedings exists.

[10] The defendants' OM was not filed within the context of a *Grainger v Hill* situation; they were not using the OM to extort some judicial relief to which they were not entitled.

[11] As a general rule, a litigant, who claims that the proceedings to which he is a party are an abuse of the process of the Court, must take objection to the proceedings through those very proceedings themselves under O 18 r 19(1)(d) of the RHC. The filing of a collateral action, such as the plaintiff's instant suit, is in itself an abuse of the process of the Court which must be struck out.

[12] What the plaintiff was really complaining of was not the defendants' OM but the allegedly adverse publicity it was getting in the press. There was no evidence that the reports which appeared in the media about the OM were printed, published, or instigated by the defendants, nor was it suggested that the said reports were inaccurate or unfair.

[13] In the result, the instant suit was struck out on the ground that the statement of claim did not disclose a reasonable cause of action, and that it was in itself an abuse of the process of the Court.

[14] The award for costs against the plaintiff in the instant suit and a proper understanding of the law should persuade future litigants who may wish to take up the plea of 'an abuse of the process of the Court' that it will be in their best interests to avail themselves of the salutary provisions of O 18 r 19(1) of the RHC.

[Plaintiff's suit struck out]

[Editor's note: The plaintiff's appeal to the Supreme Court vide Civil Appeal No: 03-85-92 was withdrawn.]

Cases referred to:
Balbhaddar Singh v Badri Shah AIR [1926] PC 46 ***(cit)***
B Madan Mohan Singh v B Ram Sunder Singh AIR [1930] All 326 ***(cit)***
Taib bin Awang v Mohamad bin Abdullah & Ors [1983] 2 MLJ 413 ***(cit)***
Pemungut Hasil Tanah, Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362 ***(cit)***
Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin [1996] 2 CLJ 270 ***(cit)***
Lonrho Plc v Fayed [1991] 3 All ER 303 ***(refd)***
Grainger v Hill [1938] 4 Bing (NC) 212 ***(dist)***
Speed Seal Products Ltd v Paddington [1986] 1 All ER 91 ***(dist)***
Goldsmith v Sperrings Ltd [1977] 2 All ER 566 ***(refd)***
Metall und Rohstoff v Donaldson Lufkin Inc [1989] 3 All ER 14 ***(foll)***
Corbett v Burge [1932] 48 TLR 626 ***(refd)***
Near v State of Minnesota [1930] 51 SCR 625 ***(refd)***
A-G v Times Newspapers Ltd [1974] AC 273 ***(cit)***
Wallesteiner v Moir [1974] 3 All ER 217 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O 18 r 19(1)(a), (b), (c), (d), O 53 r 1A
Town and Country Planning Act 1976

Other sources referred to:
Encyclopedia of Court Forms in Civil Proceedings, Atkin, 2nd Edn, Vol 25 [1982] p 295
Halsbury's Laws of England, 3th Edn, Vol 37, p 128, 4th Edn, Vol 45, para 1381
Pleadings in India, J.P. Aggarwala [1990] Vol 1 pp 128, 129, 131
Precedents of Pleadings, Bullen, Leake & Jacob, 13th Edn, pp 642, 645
Words and Phrases Legally Defined, Butterworth, 3rd Edn, Vol [1988] p 320

For the plaintiff - William Leong; M/s Cheang & Ariff
For the 1st, 2nd, 3rd, 4th, 6th and 7th defendants - Dato' Harun Idris (Yeoh Poh San with him); M/s Harun Idris, Yeoh & Partners
For the 5th defendant - Azlan (Derek Fernandez, Prasad Abraham & Wendy Terang with him); M/s Prasad Abraham & Asso

JUDGMENT

Mahadev Shankar JCA:

I struck this action out on the ground that the statement of claim did not disclose a reasonable cause of action and also on the ground that it was an abuse of the process of this Court. My reasons now follow.

The first three defendants have their dwelling houses in Jalan 5/60, Petaling Jaya. The next three live in Jalan 5/54. The seventh lives in Jalan 5/42. They are collectively referred to as "the defendants". Their houses are located in close proximity to the Bukit Gasing Ridge. A susbtantial portion of Bukit Gasing was designated a Green Belt area.

The concern of the defendants to preserve the environmental integrity of the area was well known to the Majlis Perbandaran Petaling Jaya (the MPPJ). In September 1990 when an unidentified developer commenced survey work in the area they alerted the MPPJ. The Town Planner James Fredericks visited the area with some of his officers and then gave a public assurance that development projects in the green belt area will not be approved. Similar assurances were given by the Barisan Nasional candidate Datuk Soong Siew Hoong, and the State Assemblyman Encik Teong Shyan Chuyan in October 1990 and early 1991.

Despite these assurances sometime in February 1991 the defendants began to notice an invasion of heavy lorries carrying earth moving equipment going up the hill past their houses and coming down with loads of earth. This daily activity led them to suspect that some large scale development was being undertaken. They did not know then that the MPPJ had already approved the project on 10 December 1990.

On 28 February 1991 the first three defendants wrote a four-page letter to the President of the MPPJ reporting these activities of the developer and protesting against this proposed development. The letter is very detailed and contained a number of very serious criticisms about the environmental impact this development would have if it was permitted to continue. Seventeen other defendants who lived in the immediate vicinity also signed their names in support of this letter. The MPPJ chose not to reply this letter.

The residents pursued the matter and were able to meet the MPPJ President, Mr Fredericks the Town Planner, Mr Patrick Gan the Chief Engineer and Encik Kamarul Baharin the MPPJ secretary. The defendants' account of what transpired at this meeting has not been seriously contradicted by those MPPJ officials. In effect they were presented with a *fait accompli.* The President is reported to have said:

> The project is already approved and there is nothing that can be done now. You are at least luckier than the section 16 people. You must know the people behind this project. Our hands are tied.

As if these ominous words were not enough, when the President was asked why the defendants were not notified of the approval or the intention to approve, the President did not reply, nor did he identify the people behind the project who tied the hands of the MPPJ.

The first defendant specifically asked for a formal reply to their letter of 28 February 1991. No reply was forthcoming. On 18 April 1991 the Petaling Jaya Peoples' Association wrote to the President asking for the following documents and information:

(1) Draft Local Plan (Current and Previous)

(2) Draft Structure Plan (Current and Previous)

(3) Local Plan (Current and Previous)

(4) Structure Plan (Current and Previous)

(5) Application for Planning Permission

(6) Approval for Planning Permission

(7) Letters to defendants regarding development

(8) Surveys, studies and memorandum regarding factors taken into account in giving planning permission

(9) Traffic dispersal studies

(10) Any other relevant documents

Again there was no reply. Meanwhile the "development" continued with its daily concomitant activities. The defendants had become painfully aware that their environment was now under threat. They felt aggrieved that the MPPJ had not given them a reasonable opportunity of being heard before the project was approved. They were frustrated by the MPPJ's refusal to answer their inquiries for further information.

They therefore filed an originating motion No: 21-111-1991 (the motion) on 3 June 1991 **for leave** to file an application for *certiorari* to quash the approval given and for consequential relief including a stay of proceedings and for discovery of documents and so on. The motion was supported with substantial affidavits to show why the defendants were aggrieved, and the reasons for the delay in making the application, which they blamed on the MPPJ's deliberate suppression of material information. They also listed alleged transgressions of the Town and Country Planning Act 1976, and the Town Boards and Enactment as to the invalidity of the manner in which the approval had been given. The developer was named as the second respondent.

On 25 June 1991 (ie within 22 days of the motion being filed) the developer filed this action against all the defendants. In the statement of claim it was revealed that the developer had bought the land which was the subject matter of this complaint on 22 February 1990. (The said land was made up 124 parcels and constituted a sizeable area of Bukit Gasing). It was also averred in the statement of claim that on 10 December 1990 the MPPJ had granted the Developer Planning Permission to develop the said lands to a housing and condominium project. (It is a fair inference therefore that the application was made some months before and the defendants may well have wondered why, if he knew about it Mr Fredericks had not disclosed this when he visited the area in September 1990).

Then follows the averments which are material to the present judgment. In paragraph 5 of the statement of claim it was alleged that the defendants and each of them had "maliciously and/or without reasonable or probable cause filed" the motion. In paragraph 7 it was alleged that the seven defendants, instigated and abetted by the fifth defendant, "wrongfully maliciously and/or without reasonable or probable cause with intent to injure, all conspired and agreed together to jointly file the action in bad faith for no other purpose than to cause irresponsible damage to the developer."

In paragraph 8 it was alleged that the seven defendants in wrongfully and maliciously filing the motion had abused the Court's process by perverting the same for their own collateral purpose with an ulterior motive and/or to cause damage to the developer by the bad publicity that the defendants would cause to the plaintiff in bringing the action and not to obtain judicial remedy.

In this context particulars were appended all of which were confined to the fifth defendant alone. The effect of these particulars were that the defendant initiated the motion so as to bring pressure to bear upon the developer to employ him as a Resident Engineer at a salary of RM10,000 per month, and to force the developer to buy the fifth defendant's property and give him a discount on two units of the developer's condominiums. Details were given of the dates and persons to whom the fifth defendant made these threats.

It was further averred that because more than 6½ months had elapsed between the date of the approval (10 December 1990) and the filing of the motion (3 June 1991) the motion was doomed to fail, that the defendants had no *locus standi* to sue the MPPJ and the developer had needlessly been named as a party to the motion.

Then followed figures of the value of units sold, the money committed to the project and by way of alleged special damage it was averred that as a result of the motion and the publicity given in the media to those proceedings, the developer's sales had slowed down, and the value of the unsold units was RM34.8 million, which the developer now sought to recover from the defendants.

The relief claimed was a declaration that the motion was an abuse of process, an injunction to prevent the defendants from continuing with the motion, general and special damages and other relief. It is not clear whether these damages are being claimed for the alleged causes of action pleaded in the body of the statement of claim, or whether it was being alleged that the facts pleaded constituted the alleged tort of "abuse of process" and the claim was for general and special damages in respect thereof.

In determining whether a statement of claim discloses a reasonable cause of action or itself constitutes an abuse of process, the state of affairs to which the Court must have regard is that which prevailed on 25 June 1991. On that

day the motion was very far from being heard. By filing this writ therefore the developer had literally sought to pre-empt the defendants from proceeding any further.

In the event, affidavits were filled by all parties concerned and the motion was eventually heard by a Judge on 18 October 1991. In a short oral judgment he held that as the application for leave had not been made within six weeks of 10 December 1990 (as provided by O 53 r 1A) he should dismiss the application. He had a discretion to extend time but he did not do so. The relevant portion of this judgment reads as follows:

> My decision is briefly as follows:
>
> (a) I find the principle officers of MPPJ had not been quite responsive to the numerous public complaints in the local press by the defendants of the affected area and had been also been less than candid in their dealings with the applicants. While I find that there is no legal duty on the part of MPPJ to give the public notice of any approval of any development project in Petaling Jaya, I am nevertheless fully satisfied that the "wall of silence" and the lack of response by relevant officers of MPPJ, especially in the early stages (ie prior to the meeting with the defendants on 13 March 1991), had contributed to the delay in the filing of these proceedings by the applicants.
>
> (b) However, the whole circumstances of this case and even after taking into account the fact that MPPJ had contributed to this delay, I find that the delay was inordinate and had not been completely accounted for to the satisfaction of the Court. I am satisfied that the applicants, with proper diligence and/or with good legal advice, could have expeditiously obtained, by administrative or legal means, the necessary information regarding the project to enable them to file these proceedings within time or soon thereafter. The unhappy defendants spent too much time ventilating their dissent and complaints in the local press. Unfortunately no positive action was taken by them to officially or legally tackle the bull by the horns until time practically ran out on them.
>
> 4. I regret that I am unable to exercise my discretion to grant the extension of time sought by the applicants in view of the inordinate delay in the circumstances of this case.
>
> Application dismissed.

The defendants appealed to the Supreme Court against that decision. Meanwhile after the defendants were served with the writ and statement of claim, six of the defendants jointly filed a summons-in-chambers to strike out the statement of claim based on all the limbs of O 18 r 19(1)(a), (b), (c) and (d). A similar application was filed separately by the fifth defendant. In the circumstances the Court was not confined to a mere perusal of the averments in the statement

of claim but could also look to the evidence (where relevant) in the numerous affidavits filed for and in support of the applications.

As I have said before it is not clear from the statement of claim what the true character of this action is because the relief claimed is for "abuse of process" alone. Indeed the whole claim could have been thrown out on a technicality because paragraph 5 of the claim avers that the motion was filed on 3 June **1990**. No such motion was filed on that date! I propose to overlook this and assume that it was meant to read 1991.

Paragraph 5 of the claim as it is worded is clearly a pleading of malicious prosecution (See *Precedent 412* in *Bullen & Leake* 13th Edn p 645). No particulars are given of the malice and lack of reasonable and probable cause and the plea should be struck out on this ground alone. However, on the basis that this was not fatal there was another reason why it could not get off the ground.

The claim for malicious prosecution against the defendants could not succeed because the action was manifestly premature. Dato' Harun Idris, referred me to the relevant passages in J.P. Aggarwala's *Pleadings in India* [1990] Vol 1 at pages 128, 129 at paragraph 103, 104 and also at page 131 and the Privy Council in *Balbhaddar Singh v Badri Shah* AIR [1926] PC 46; *B. Madan Mohan Singh v B. Ram Sunder Singh* AIR [1930] All 326 at 328 and also *Taib bin Awang v Mohamad bin Abdullah & Ors.* [1983] 2 MLJ 413. I agree that it was not open to the developer to launch a claim for malicious prosecution until the proceedings in the motion had been finally resolved. That could only be when the appeal had been concluded.

It is self-evident from the facts that the defendants would have had an arguable case on appeal. The Court of first instance had a discretion to extend time and it is hard to see how the defendants could have applied within 6 weeks of 10 December 1990 (ie before the 21 January 1991) when their first inkling that something was wrong was about mid-February 1991. The Judge himself acknowledged that the MPPJ had stone-walled the defendants in their legitimate inquiries for information. Besides if the approval was void *ab inito,* the bar of limitation was not attracted: see *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v Kam Gin Paik & Ors.* [1986] 1 MLJ 362 (a Privy Council decision). The defendants had alleged this in their application. The statement aforesaid attributed to the President, (which so far as I am aware was not credibly denied) indicated that the decision-making process in granting this approval was fatally flawed because if the MPPJ was so intimidated by the people behind the project that their hands were tied they could not be regarded as having decided the matter at all. The President's words can only mean that the matter was decided for the MPPJ by those people.

The second complaint against these six defendants was that they had entered into a conspiracy with the fifth defendant to file the motion. However, apart from the bare assertion of conspiracy based on the joint filing of the action, no particulars of any kind were alleged against these six defendants to show how they were linked to the misdemeanours alleged against the fifth defendant. Just as fraud must be pleaded with great particularity so also all the constituent ingredients going to make up the conspiracy must be pleaded. On this ground alone the claim for conspiracy fails.

There is more to it than that. It has to be emphasised that the relief sought in the motion was primarily aimed at the MPPJ with a view to getting its approval quashed. The developer is joined in such applications because it is a party whose interest could be affected: See *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin* [1996] 2 CLJ 270; [1995] 1 MLJ 70.

Dato' Harun referred me to the definition of conspiracy in Butterworth's *Words and Phrases Legally Defined* 3rd Edn Vol [1988] at page 320 and Vol 37 *Halsbury's Laws of England* 3rd Edn p 128. Mr William Leong of Counsel for the developer referred me to *Lonrho Plc v Fayed* [1991] 3 All ER p 303. I think it can be fairly stated that to establish the tort of conspiracy to injure the developer by lawful means it has to be pleaded that in the filing of the motion the predominant purpose of the defendants as conspirators was to injure the developer. Since the primary or predominant purpose of the defendants in filing the motion was to further and protect legitimate interests of their own, the allegation of a parallel intention of injuring the developer could not be sustained unless the defendants used unlawful means.

On both counts the allegation of conspiracy fails against all the defendants, because it is not alleged that the **predominant** purpose of the defendants was to injure the developer, nor is it alleged that unlawful means were used.

Abuse of Process

This may well be the first time in Malaysia that a litigant has attempted to put forward the proposition that the malicious institution of proceedings is an abuse of process by way of a distinct tort.

Mr Prasad Abraham, Counsel for the fifth defendant drew my attention to Bullen, Leake & Jacob's *Precedents of Pleadings* (13th Edn) p 642 on the ingredients of malicious prosecution. He also referred me to the passages on abuse of civil process which reads:

(b) Abuse of Civil Process

> An action also may lie for the abuse of ordinary civil process. In respect of a tort of maliciously instituting proceedings, in most respects, the matters which must be proved and pleaded are fundamentally the same except as to:

(b) above, for the proceedings do not need to have determined in the plaintiff's favour. Hence in an appropriate case there can be a counterclaim for abuse, of civil process within the very action complained of. (See *Grainger v Hill* [1938] 4 Bing (NC) 212 and *Speed Seal Products Ltd v Paddington* [1985] 1 WLR 1327 (though as to this see *Metal und Rostoff* below at 614H).

(e) above, for the plaintiff must prove special damage.

The leading can is *Speed Seal* (above) where the defendant in an action successfully applied for leave to amend to add a counterclaim alleging the tort of abuse of process of the Court, on the basis that the plaintiff's action had been brought in bad faith with the ulterior motive of damaging the defendant's business, rather than for the protection of any legitimate interest of the plaintiff.

The existence of this tort was, however, doubted by the CA in *Metal und Rostoff v Donaldson Inc* [1989] 3 WLR 563 at 609-615.

He also referred me to Atkin's *Encyclopedia* of *Court Forms in Civil Proceedings* (2nd Edn) Vol 25 [1982] at p 295. The passage reads:

Process of law, itself a means of righting a wrong, is also weapon with which the unscrupulous or malicious person may inflict real injury on another. For such a wrong, the law, besides providing various other remedies for such an abuse of its criminal or civil process, will under certain conditions afford a remedy by civil action for malicious prosecution or for a malicious abuse of civil procedure. The scope of the action is, however, severely limited by the necessity of proving damage recognised by the law. A successful defendant in civil proceedings has usually already vindicated his reputation, and so can suffer no lasting injury, and he is sufficiently safeguarded against financial loss by the ability of the first Court to award him costs; even though the expenses incurred in an action may not be fully recovered when the successful party is awarded costs, the difference is not recoverable by action since he will already have been compensated so far as the law chooses to compensate him (*Berry v British Transport Commission* [1961] 1 QB 149; on appeal [1962] 1 QB at 319-333, CA. (Emphasis mine).

Developer's Counsel cited a number of English cases and Vol. 45 *Halsbury Laws of England* (4th Edn) para 1381 and note 4 which reads as follows:

1381. When the action lies. It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and, as a result, to cause damage. The plaintiff need not prove want of reasonable and probable cause, nor need the proceedings have terminated in his favour. He must show that the defendant has used the proceedings for some improper purpose. This tort differs from malicious prosecution in that proof of any special damage is sufficient (*Grainger v Hill* [1938] 4 Bing NC 212. In *Corbett v Burge. Warren and Ridley Ltd* [1932] 48 TLR 626, it was said that loss of business profits was not a recoverable head of damage. (Emphasis mine).

It seems to me that some of the passages quoted from the text books require qualification. I therefore purpose to analyse the cases cited. But before I do that I want to say in the most emphatic terms that if a litigant brings an action to protect his rights (as the defendants did in filing the motion) the use of all remedies afforded to him by the law cannot be an abuse of the Court's process. Usually the reasons why an action has been brought is only determined at the conclusion of the proceedings. Here the developer filed this action praying for relief which included an injunction, the effect of which was to prevent the defendants from proceeding with a motion they had filed for a relief by way of *certiorari* which is recognised by the law. To grant such an injunction would have been a denial of justice by the Court.

As to what constitutes an abuse of process, it would salutary to remind ourselves that in *Grainger v Hill* it was obvious that the plaintiff knew he never had a cause of action in the first place. Secondly he proceeded with his action in order to extort a relief he was never entitled to in law. The facts of this case are set out in *Speed Seal Products Ltd. v. Paddington* [1986] 1 All Er 91 at p 98 from which it was apparent that the proceedings were commenced for a debt **not yet due**. He then extorted the defendant's ship's register and prevented the ship from sailing. Apparently the action (for recovery of the debt had been settled before) the debtor defendant brought a separate action for damages and the recovery of the register. He now succeeded on the basis that the plaintiff has abused the process of the law. This case was heard before the merging of the jurisdiction of equity and common law, and the *ratio* of the case seems to be that it was not necessary for the earlier action to have terminated before the relief claimed could be granted.

The passages from the decision of Lord Denning MR in *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 which developer's Counsel cited came from a dissenting judgment. The reasons given by the majority ie Scarman & Bridge L.JJ are so compelling that I would echo Lord Scarman's comment (at p 582j) that, "The logic (of Denning MR in this case) is superficially attractive but the conclusion is suspect."

These passages from the judgment bear repetition:

> (1) Men go to law to redress a grievance. They may not know or understand the limits of the remedies provided by law – though no one suggests that the plaintiff's advisers could be said to suffer from ignorance of the law. But equally a man, while pursuing the remedies offered by law, may negotiate, to secure by agreement with the parties sued, terms more favourable than, or different from, what he would get in the absence of agreement. Such a negotiation, undertaken by properly advised parties, each of whom may have a legitimate interest on avoiding litigation and may be prepared to concede more than the law requires of them to achieve that end, does not necessarily mean that the plaintiff by his litigation is reaching out to secure a collateral advantage. Lord Scarman at p 583.

(2) Counsel for the defendants relied, in support of the submissions which I have summarised in paras 1 and 2 above, on the *dictum* of Evershed MR in *Re Major* [1955] 2 All ER 65 at 78, [1955] Ch 600 at 623, 624:

> The so called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exists; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the Court, and, therefore, disqualified from invoking the powers of the Court by proceedings he has abused.

For the purpose of Evershed MR's general rule, what is meant by 'collateral advantage'? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the Court's power to grant him. Actions are settled quite properly every day on terms which a Court could not itself impose on an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the Court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land, these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursing an ulterior purpose unrelated to the subject-matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain, but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation. Can he on that ground be debarred from proceeding? I very much doubt it. But on the view I take of the facts in this case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract (Lord Bridge) at p 585, 586. (Emphasis mine).

As can be seen from the report at p 569 the application for relief on the ground of "abuse of process" was made in the action itself *inter alia* under the provisions of O 18 r 19.

In *Speed Seal Products Ltd v Paddington & Anor* [1986] 1 All ER 91 the claim of abuse of process was made by the defendant by way of a counterclaim in the same action. The decision is of little assistance because it turned entirely on whether the defendant should be given leave to amend his defence to include such a claim. The abuse of process alleged did not turn on whether the plaintiffs were seeking a collateral advantage but on whether the plaintiffs were entitled to maintain the claim at all. The defendant claimed that he was the originator of an industrial design before he went to work for

the plaintiffs. The design was used in work executed for the plaintiffs whilst the defendant was in their employment. The defendant then left the plaintiffs and set up his own company. He continued to use the design on work done for his customers. The plaintiff filed this action claiming ownership of the design and threatened action against the defendant's customers. I do not think *Bullen & Leake* gives the true picture on whether "abuse of process" for a collateral purpose exists as a distinct tort.

For this I turn now to the case of *Metall und Rohstoff v. Donaldson Lufkin Inc.* [1989] 3 All ER 14 (also at 3 WLR 563). Mr. Leong submitted that this decision has been overruled by *Lonrho Plc* [1991] 3 All ER 303. But that is only correct in so far as the Court of Appeal in *Metall* misunderstood the ambit of the law of conspiracy as enunciated by Lord Diplock. At the risk of distortion by over simplification it seems to me that the crux of that aspect of the matter was that the predominant objective of the conspiracy had to be to injure if the means was lawful. If the means were unlawful it sufficed if the intention was to injure, regardless of any other mixed motives.

The point however is that as to the doubtful existence of the alleged tort of maliciously instituting civil proceedings the *dicta* of the Court is still intact. The headnote reads at page 16:

> (4) The tort of abuse of the process of the Court consisted of an abuse of legal process to effect an object not within the scope of the process and with the predominant purpose of using the process for a purpose other than that for which it was designed with the result that the person alleging the abuse had suffered damage. However, the adduction by a person of false evidence and the submission of a false case for the purpose of sustaining his own claim of defeating the other party's claim did not give rise to the tort of abuse of the process of the Court. Accordingly, the false evidence given on behalf of the broker and the first and second defendants to enable the injunction to be lifted so that the loans could be repaid by the broker to its parent companies in breach of the undertaking did not give rise to the tort of abuse of the process of the Court and the plaintiffs were not entitled to leave in respect of that tort (see p 49h, p 50 a e h, p 52 h and p 64 g h, post); *Grainger v Hill* [1838] 4 Bing NC 212 applied.

The analysis of the cases by Slade J starts at page 49 at g. At pages 50 and 51 these pages appear:

> (1) On the particular facts of *Grainger v Hill* the last condition was satisfied. The process in question consisted of the swearing by the defendants of an affidavit of debt, the obtaining of a writ of *capias*, the sending in of two sheriff's officers with the writ to the plaintiff and the plaintiff's arrest. The purpose for which the process was originally designed was manifestly the recovery of a due debt. The purpose for which it was actually used, on the facts of that case, was the extortion of a ship's register belonging to the plaintiff to which the defendants had no right.

(2) No doubt the adduction of false evidence and the submission of a false case for the purpose of sustaining or defeating a claim in legal proceedings may subject the guilty plaintiff or defendant (as the case may be) to sanctions by way of a penal order for costs or even a prosecution for perjury. In our judgment, however, it does not expose him to an action for damage in tort under the principle of *Grainger v. Hill*.

No authority has been cited to us which satisfies us that it does. If the use of Court process is to expose a party to liability under this principle, the process must, in our judgment, have been used for a predominant purpose 'outside the ambit of the legal claim upon which the Court is asked to adjudicate' (cf *Varawa v Howard Smith Co.* [1911] 13 CLR 35 at 91 *per* Isaacs J). Relief in tort under the principle of *Grainger v Hill* is not, in our judgment, available against a party who, however dishonestly, presents a false case for the purpose of advancing or sustaining his claim or defence in civil proceedings. This may well cause hardship to an injured party who cannot be sufficiently compensated by an appropriate order for costs.

However if there is a gap in the law it rests on sound considerations of public policy, as does the rule of law which gives immunity to witnesses against civil actions based on the falsity of evidence given in judicial proceedings. If the position were otherwise, honest litigants might be deterred from pursuing honest claim or defences and honest witnesses might be deterred from giving evidence (cf generally *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465 at 469, [1988] Ch 229 at 235 *per* Scott J and the cases there cited).

In short we agree with the Judge, for much the same reason as his, that the facts relied on do not raise an arguable case that there was an *abuse of process* falling within the *Grainger v Hill* principle.

Perhaps implicitly recognising *M&R's* difficulties in this context, counsel for *M&R* in his reply focused particular attention on a quite different, alternative way of putting its case on this issue. He sought to rely on a tort or alleged tort having ingredients distinct and different from those constituting a *Grainger v Hill* type abuse of process, namely a tort of **malicious institution of proceedings**. Reference to the transcripts shows that this point was raised, albeit briefly, in argument both before Gatehouse J and in the opening of *M&R's* cross-appeal before this Court. The judge, however, clearly did not appreciate that a separate tort, quite distinct from that established by *Grainger v Hill* was being relied on, since he made no reference to it in his judgment. (Emphasis mine)

(3) There is a well-established tort know as the tort of malicious prosecution. Its essential ingredients are conveniently set out in a passage in 45 *Halsbury Laws* (4th edn) para 1368, which sets out the matters which have to be pleaded to establish a tort of this nature:

> A plaintiff must expressly state in his statement of claim: (1) the previous proceedings instituted by the defendant of which he complains; (2) that in so far as they were capable of doing

> so they terminated in his favour; (3) that there was no reasonable and probable cause for the defendant instituting or carrying on those proceedings; (4) that the defendant was actuated by malice; and (5) that he had suffered damage.

Paragraph 1371 suggest that an analogous action lies for bringing 'malicious civil proceedings'. The same suggestion is made in *Clerk and Linsell on Torts* (15th edn. 1982) para 18-38, where it is stated:

> An action lies for the abuse of ordinary civil process, which differs only from an action for malicious prosecution in that the gist of it seems to be the special damage. Malice and absence of reasonable and probable cause must be proved in the same manner in the one as in the other. Similarly, malice is a question for the jury, who may but are not bound to infer from its presence the want of reasonable and proper cause; it must be proved also that the proceedings came to a due legal end.

The tort referred to in *Clerk and Lindsell* para 18-38 is plainly the same as that referred to in 45 *Halsbury's Laws* (4th Edn) para 1371.

Although we have not heard full argument on this point, we have great doubt whether any general tort of maliciously instituting civil proceedings exists. The Court have countenanced claims by a plaintiff complaining of a malicious and unjustified arrest or of malicious and unjustified institution of bankruptcy or liquidation proceedings, but the cases have not (to our knowledge) gone beyond these limited categories. There are *dicta* suggesting that in the case of an ordinary civil action, however maliciously and unjustifiably brought, the successful defendant has no cause of action in tort (see *Johnson v Emerson* [1871] LR 6 Exch 329 at 372 *per Martin B* and *Quartz Hill Consolidated Gold Mining Co v Eyre* [1883] 11 QBD 674 at *per* Brett MR).

This case is certainly not a *Grainger v. Hill* type of situation. The defendants were not using the motion to extort some judicial relief they were not entitled to. On the contrary in the 23 days which elapsed from the filing of the motion, the developer had drummed-up a claim that it had sustained RM34.8 million in damage from sales it had allegedly lost because of the filing of the motion and the attendant publicity. Even if it were true that such sales had failed to materialise, (and this is inherently incredible) I hold on the strength of *Corbett v. Burge* [1932] 48 TLR 626 that loss of business profits is not a recoverable head of damage let alone special damage of the kind required to sustain an action for abuse of process.

As a general rule I think it safe to state that a litigant who is a party to civil proceedings who claims that those proceedings are an abuse of process must take that objection in those very proceedings under O 18 r (19)(1)(d). The filing of a collateral action as was done in this case is itself an abuse of process which must result, as happened here in its being struck out.

At the end of the day it transpired that what the developer was really complaining of was not the motion which had been filed but the allegedly adverse publicity they were getting in the press. There is no evidence whatsoever that the reports which appeared in the media about the proceedings initiated by the defendants were printed, published or instigated by the defendants. It has not been suggested that these reports were in any way inaccurate or did not represent a fair and accurate report of a judicial proceeding. This is a good place to repeat what Hughes CJ said in *Near v. State of Minnesota* [1930] 51 SCR 625 at 630 quoting from *Blackstone's* commentaries:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published. Every free man has an undoubted right to lay what sentiment he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

Defence Counsel has submitted that the real object of this writ was to "gag" the defendants by frightening them away from the Courts. This situation has some parallels with *A.G. v. Times Newspapers Ltd.* [1974] AC 273 at 312, and *Wallesteiner v. Moir* [1974] 3 All ER 217 at 230.

In the light of my other findings I do not think it is necessary for me to go into the developer's motives for filing this action. Suffice to say in conclusion that I hope the award for costs against the developer in this case and a proper understanding of the law should persuade future litigants who wish to take up a plea of abuse of process that it would be in their best interests to avail themselves of the salutary provisions of O 18 r 19(1) of the Rules of High Court 1980.

Reported by Gan Peng Chiang